No. 20526

United States
COURT OF APPEALS
for the Ninth Circuit

SCHNITZER STEEL PRODUCTS CO.,
a corporation,

Appellant,

v.

AMTRO CORPORATION, S.A., a Panamanian corporation, and CIA. ESTRELLA BLANCA, LTDA., as Owner of the SS NICTRIC,

Appellees.

v.

SCHNITZER STEEL PRODUCTS CO.,
a corporation, and

CIA. ESTRELLA BLANCA, LTDA.,
as Owner of the SS NICTRIC,

Cross-Appellees.

BRIEF OF CROSS-APPELLEE SCHNITZER STEEL PRODUCTS CO. ON CROSS-APPEAL

Upon Appeal from the United States District Court for the District of Oregon

HONORABLE JOHN F. KILKENNY, Judge

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STATEMENT OF THE CASE

Amtro's Statement of the Case in its brief on cross-appeal states as facts several things which are without support in the record, and makes other statements of

fact which are disputed in this cross-appeal or in Schnitzer's appeal, or both. Schnitzer therefore does not adopt Amtro's statement of the case on its cross-appeal. Schnitzer's differences with Amtro on what the record shows or does not show, however, can be more conveniently set forth in argument answering the points raised by Amtro in its brief on cross-appeal.

SUMMARY OF ARGUMENT

I

Schnitzer is not liable for the damages awarded to Owners against Amtro for breach of the time charter in failing to pay the time charter hire.

1. Amtro's claim on its cross-appeal for recovery of additional damages against Schnitzer depends in the first instance on the question of whether Schnitzer was liable for demurrage under the voyage charter terms. If Schnitzer was not liable for it, as Schnitzer asserts on its appeal, there was no breach of the voyage charter and thus no basis for Amtro claiming further sums as consequential damages for breach of contract or for tort.

2. Neither the length of the delay in discharge nor Amtro's loss of its time charter for failure to pay charter hire were reasonably foreseeable consequences when the voyage charter was entered of Schnitzer's nonpayment of demurrage.

3. The measure of damages for failure to pay a liquidated sum of money is recovery of the sum plus interest from the date payment was due.

4. There is no evidence that Schnitzer's failure to pay the demurrage was the legal cause of Amtro's unwillingness or inability to pay the time charter hire it owed to Owners.

5. Amtro failed to avoid or minimize its loss by exercising its lien on cargo to collect the demurrage.

6. There is, at the least, a substantial question of whether Schnitzer is liable for the demurrage. A party to a contract should not be required to choose between abandoning his right to litigate a questionable obligation and the risk of substantial additional damages if the disputed question is decided adversely to him in the courts.

7. Nonpayment of a questionable debt does not constitute the tort of wrongful interference with contractual relations between the promisee and a third party. There is no evidence of intent by Schnitzer to interfere with Amtro's relations under its time charter with Owners, nor any causal relationship between Schnitzer's nonpayment of demurrage and Amtro's failure or inability to pay the time charter hire to Owners.

II

The difference between the agreed demurrage rate and Amtro's expenses during the demurrage period or any portion of it is not recoverable as "extra expenses" under Clause 1 of the voyage charter party.

1. The "extra expense" clause was intended to deal with expenses attributable to turnings, which might require special handling or precautions.

2. There is no evidence that all or any part of the delay in discharge was due to the cargo being scrap, rather than logs, lumber, grain or any other cargo.

3. The demurrage clauses of a charter party are the agreed compensation for delay of the vessel in loading or discharge beyond the agreed period.

ARGUMENT

I

Schnitzer is not Liable for the Damages Awarded to Owners against Amtro for Breach of the Time Charter in Failing to Pay the Time Charter Hire.

Amtro breached its time charter (Ex. 1) of the NICTRIC by failing to make the monthly charter hire payments due in November and December, 1961 (R. 132). Owners therefore withdrew the vessel from the time charter upon completion of cargo discharge on December 31, 1961. The District Court awarded damages to Owners against Amtro for breach of the time charter in the amount of $24,745.27 (R. 136).

Amtro claims that it should be allowed to recover these damages for breaching its time charter from Schnitzer, on either of two theories:

(a) As consequential damages flowing from Schnitzer's alleged breach of the charter party in failing to pay the demurrage; or

(b) As damages for Schnitzer's alleged tort of wrongful interference, in failing to pay the demurrage, with contractual relations between Amtro and Owners.

The District Court denied recovery to Amtro against Schnitzer on this matter. It found the consequential damage theory inapplicable, and did not discuss the tort theory because it was neither presented nor argued to the District Court by Amtro. The Court's opinion and findings in full on this phase of the case were as follows (R. 148):

"CONSEQUENTIAL DAMAGE

"This demand is an alternative to the claim for fraud. Amtro urges that Schnitzer's refusal to pay the balance of the freight and demurrage, when due, caused the withdrawal of its time charter, and as a result consequential damage was inevitable. To be conceded is the fact that judgment in the sum of $24,745.27 and interest is being allowed to Owners as damages for breach of the time charter. The issue presented is whether Schnitzer is liable in whole, or in part, for this or other loss.

"After a complete analysis of the evidence before me, I do not believe that it would support a finding that either Amtro or Schnitzer contemplated the long delay which was incurred at the ports of discharge, nor could Schnitzer contemplate that its failure to pay demurrage would result in a withdrawal of the charter and consequential damages as herein fixed. As a general rule, under a charter such as this, the amount fixed as demurrage, and interest allowed thereon, fixes the amount of damages. *Globe Refining Co.* v. *Landa Cotton Oil Co.,* 190 U.S. 540 (1903); Poor, Charter Parties & Ocean Bills of Lading, Sec. 82; *Earnline S. S. Co.* v. *Manati Sugar Co.,* 269 F. 774 (2d Cir. 1920). This record does not support the allowance

of consequential damages to Amtro, in addition to demurrage."

Amtro admits in its brief on cross-appeal, p. 16, that the District Court's findings are supported by evidence and binding.

In contending that Schnitzer is liable for additional sums either as consequential damages for breach of contract or as damages for tortious interference with contractual relations, Amtro assumes that Schnitzer was in fact and in law liable in the first instance and obligated to pay the demurrage to Amtro under the terms of the voyage charter. If, as Schnitzer contends on its own appeal and briefs in support thereof, it was not liable to Amtro for the demurrage, there was no breach of the voyage charter by Schnitzer and there could be no basis for any further liability to Amtro either in contract or tort. The Court, therefore, will not reach Amtro's cross-appeal against Schnitzer if the award of demurrage against Schnitzer is reversed on its appeal.

A. Amtro's Breach of its Time Charter and the Damages awarded to Owners for it are not Recoverable from Schnitzer as Consequential Damages for Failure to Pay Demurrage.

It is a universal and long-accepted rule of contract law that damages for breach of contract are limited to compensation for those consequences reasonably foreseeable or within the contemplation of the parties when the contract was entered. 5 Williston, CONTRACTS (Rev. Ed. 1937) Sec. 1344. The leading American case is Justice Holmes' opinion for the Court in *Globe Refining*

Co. v. *Landa Cotton Oil Co.,* 190 U.S. 540, 23 S. Ct. 754, 47 L. Ed. 1171 (1902). The rule is applicable in admiralty to a breach of charter party. *Earn Line S. S. Co.* v. *Manati Sugar Co.,* 269 F. 774, 777 (C.C.A. 2, 1920); Poor, CHARTER PARTIES & OCEAN BILLS OF LADING (4th Ed. 1954) Secs. 82, 84.

The rule looks to what the parties could reasonably foresee or contemplate as harm from a breach of contract when they entered the contract, and not at some later date during its life. Justice Holmes stated this clearly in the *Globe Refining Co.* case, *supra*:

> "This point of view is taken by implication in the rule that 'a person can only be held to be responsible for such consequences as may be reasonably supposed to be in the contemplation of the parties at the time of making the contract.' [citation of cases omitted] The suggestion thrown out by Bramwell, B., in *Gee* v. *Lancashire & Y. R. Co.* 6 Hurlst. & N. 211, 218, that perhaps notice after the contract was made and before breach would be enough, is not accepted by the later decisions. See further, *Hydraulic Engineering Co.* v. *McHaffie,* L.R. 4 Q.B. Div. 670, 674, 676. The consequences must be contemplated at the time of the making of the contract." (190 U.S. at 544)

The evidence clearly supports the Court's findings (R. 148) that neither Amtro nor Schnitzer contemplated, when entering the voyage charter, the extraordinary delay in discharging the cargo (Tr. 43-45, 154, 186; Ex. 79, pp. 6-8).

Nor, as the Court found (R. 148), is there any evidence that Schnitzer could reasonably have then

foreseen that failure to pay demurrage would result in withdrawal of the time charter for Amtro's failure to pay the monthly charter hire. There is no evidence that Schnitzer when entering the voyage charter had any knowledge whatever of the terms of the time charter between Owners and Amtro, the financial structure of Amtro, that the NICTRIC charter was Amtro's first or only venture, or of Amtro's actual or potential sources of revenue for paying charter hire on its time charter of the NICTRIC. Mr. Leonard Schnitzer testified that the identity of the particular vessel and its time charterer was kept secret by the charter broker, in accordance with brokers' custom, until the terms of the voyage charter were thought to have been fixed (Tr. 172-173, 178). Knowing nothing about Amtro's finances or operations, Schnitzer could hardly be expected to anticipate when the voyage charter was entered that payment of demurrage money several months later would become essential for Amtro to keep up its time charter hire payments to Owners.

A promisee's inability to perform a collateral contract because of its promisor's breach of contract is not compensable as consequential damages for the promisor's breach, either in admiralty or civil law, in the absence of the promisor's special knowledge when making his contract of the collateral contract between the promisee and another party and of the probable effect of his breach on the promisee's ability to perform the collateral contract. *Globe Refining Co.* v. *Landa Cotton Oil Co., supra; Continental Grain Co.* v. *Armour Fertilizer Works,* 22 F. Supp. 49, 55 (S.D. N.Y.

1938); 5 Williston, CONTRACTS, Sec. 1355. While Schnitzer knew when signing the voyage charter that Amtro was time charterer of the vessel, there is no evidence that it had any knowledge whatever when the voyage charter was entered that there would be extensive delay in discharge or that failure to pay demurrage would bring about loss of Amtro's time charter from Owners. For all Schnitzer then knew, the entire time charter hire might have been prepaid.

Where the breach of contract is a failure to pay a liquidated sum of money, the measure of damages is interest on the sum from the time payment was due, together with recovery of the principal itself. *Loudon* v. *Taxing District of Shelby County,* 104 U.S. 771, 26 L. Ed. 923 (1882); 5 Williston, CONTRACTS, Sec. 1410. Amtro's claim here is founded simply on failure of Schnitzer to pay the demurrage money, and not on the fact that extensive demurrage was incurred due to delay in discharging. Amtro itself claims that the time charter could have been re-instated despite the long period on demurrage if Schnitzer had simply paid the demurrage monies on completion of discharge or shortly thereafter (See Amtro's Brief on Cross-Appeal, pp. 13-14). Since the voyage charter stipulated both the beginning date of the demurrage period and the rate of demurrage during the period, the amount of the demurrage monies was fixed upon completion of discharge.

The rule that interest provides the damages for breach of an obligation to pay money is more than a

rule of convenience. It requires sheer speculation in almost any such case, including this one, to say that failure of the promisee to pay a sum of money, rather than any other source of the promisee's financial difficulty, is the cause of the promisee's lack of funds to meet collateral obligations. Could Amtro have borrowed the sums necessary to meet the time-charter hire payments? Was Amtro undercapitalized from the beginning for this business? Did it use its $100,000 capital (Tr. 52-53, 67) and revenues (at least 90 per cent of the $65,-000 NICTRIC voyage charter hire, R. 105) improvidently? Did it have other reasons than the unloading delay on this voyage and lack of demurrage monies for deciding not to pay time-charter hire and allowing withdrawal of the vessel, such as lack of cargoes for a return voyage (Tr. 60 et seq.)? There may be many reasons for or causes of a promisee's lack of funds to perform a collateral contract, and it cannot be proved in this or any other case that the promisor's failure to pay a sum due under its contract was the efficient or principal cause of the promisee's breach of the collateral contract. All that this record may show is that the demurrage monies on completion of discharge may have been more than the amount necessary for Amtro to re-instate the time charter. For all the record shows, Amtro may also have had other creditors who would have seized enough of the demurrage monies, if paid, to reduce the sum below the delinquencies under the time charter.

In short, there is every reason for adhering in this case to the well-settled rules of damages for breach of contract that compensable loss must have been rea-

sonably within the contemplation of the parties when the contract was entered, and that interest is the measure of damages for failure to pay a liquidated sum of money due under a contract. Neither the unusual delay in discharge nor loss of Amtro's time charter after nonpayment of demurrage was reasonably foreseeable by the parties when the voyage charter was entered. There is no evidence that nonpayment of the demurrage, any more than any other factor contributing to Amtro's financial condition, was the legal cause of Amtro's failure or inability to pay time-charter hire.

Moreover, Amtro failed to avoid or minimize its loss by means readily available to it for collecting the demurrage monies, if they were essential to meeting its time charter obligations. The voyage charter (Ex. 2) gave Amtro a lien expressly to provide security for the payment of demurrage. Amtro could have exercised its lien on the cargo by stopping discharge until the consignees paid or gave security for the demurrage and it could have sold the cargo to collect these sums, if necessary. As shown in Schnitzer's opening brief on its appeal (p. 51 et seq.), Amtro made no efforts to do any of these things, although it had begun to threaten exercise of the lien shortly after demurrage began to accrue in October 1961 (Tr. 80-81, 192-193). Amtro's failure to use means readily available to it to collect the demurrage and thereby avoid loss of its time charter precludes it from claiming additional damages, as well as the demurrage. *New York & Cuba Mail S. S. Co.* v. *Lamborn,* 13 F.2d 535 (CCA 2 1926); *Continental Grain Co.* v. *Armour Fertilizer Works,* 22 F. Supp. 49,

55 (SD NY 1938); 4 Williston, CONTRACTS, Sec. 1099B, p. 3102.

Although admitting its lack of any authority in point for doing so (Br. p. 21), Amtro would have the Court create a rule that one who denies a questionable liability for payment of a sum of money must either abandon his right to litigate the question of liability in the courts and pay the disputed sum, or run the risk of suffering a penalty by way of unforeseen additional damages if he litigates the initial liability question and receives an adverse decision. Such a rule, of course, would put unjustifiable coercive power in the hands of the claimant to a disputed debt by forcing the alleged obligor to predict, at the peril of vastly increased damages, how the courts will decide disputed questions of law and fact.

The briefs of the parties on Schnitzer's appeal on the demurrage question show, at the very least, that there is a good-faith question whether Schnitzer is liable for the demurrage under the terms of the voyage charter party. It is not reasonable to assume, as Amtro does, that Schnitzer would arbitrarily and without good-faith belief in its position refuse to pay the demurrage after notice that non-payment would result not only in a suit for the principal sum and interest, but also a claim by Amtro for substantial additional damages for loss of its time charter (see Amtro's Brief, p. 14, footnote 4), as well as interest on a large amount of demurrage.

There may be cases where refusal to perform a disputed obligation is so maliciously-intended and bereft

of reason or good faith that some sort of penalty by way of increased damages is merited. This case is not one of them.

B. Non-Payment of a Questionable Debt is not a Tort.

Even more strained is Amtro's argument (Brief, p. 28 et seq.) that Schnitzer's failure to pay the demurrage constituted the tort of intentional and unjustifiable interference with Amtro's contractual relations with Owners (the time charter). This claim was not presented or argued to the District Court, and therefore was not decided by it.

It is clear that actionable interference with contractual relations arises only where the acts claimed to be wrongful were intended to induce a breach of a collateral contract between other parties. 1 Harper & James, Torts (1956) Sec. 6.6, pp. 492-493. Amtro's brief seems to concede this at p. 34. There is no evidence in this case that Schnitzer's refusal to pay the demurrage here was based on anything other than its belief that it was not liable for it, under the terms of the voyage charter party.

The Knickerbocker Ice Co. cases[1] cited by Amtro (Brief, p. 33 et seq.) involved the defendant's refusal to honor supply contracts, with the express intention of inducing the promisee to cease contractual relations with a third party, in order to force the third party to buy from the defendant at higher prices.

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[1] *Knickerbocker Ice Co.* v. *Gardiner Dairy Co.*, 107 Md. 556, 69 A. 405 (1908); *Sumwalt Ice Co.* v. *Knickerbocker Ice Co.*, 114 Md. 403, 80 A. 48 (1911).

Schnitzer had the right and privilege of litigating in court whether it was liable for the demurrage, particularly when this suit had been commenced against it on December 14, 1961 (R. 1), before the discharge of cargo was completed on December 31, 1961, and before Amtro sent, on December 26 and January 2, 1962, its notices that payment of demurrage monies was necessary for it to meet its time-charter hire obligations (see Amtro's Brief, p. 14 footnote 4). A party cannot reasonably be charged with a tort for litigating in the courts whether it is liable for a sum of money claimed by another. Amtro has produced no authority even remotely supporting its contention to the contrary.

The weakness of Amtro's argument is apparent at p. 39 of its Brief:

> "Perhaps even in the face of the known damage to the other party, a party to a contract should be privileged to refuse payment in order to assert what it believes in good faith to be a defense to payment. Even here, however, it could be argued with great force that if a party should choose to rely on such a defense in the face of known damage to the other party, the party so relying should be required to do so at its peril to the extent that, if the court subsequently holds the defense to be groundless, the party should be required to pay the compensatory damages."

Amtro's argument would have the Court hold that a tort, as well as a breach of contract, may be committed if one fails to perform a contractual obligation to pay a sum of money in the belief that he is not liable for it

and litigates the matter in court, but suffers an adverse decision on the question of contractual liability. If the court decides adversely to him, his earlier action in failing to pay money may be held to have been a tort; if the decision is in his favor, his earlier action was neither breach of contract nor tort. Surely the existence of a tort cannot depend on accurate prediction of how a court will decide disputed questions of law and fact in the interpretation and application of contractual provisions.

The *Blumenthal*[2] and *Poznan*[3] cases relied on by Amtro (Brief, p. 35 et seq.), both involve non-performance of a contract to ship or carry goods of a third party, with resulting loss or damage to the third party. The analogy to this case would exist only if Owners here were suing Schnitzer for some harm they sustained because of Schnitzer's failure to pay the demurrage to Amtro. The tort in those cases was not a wrong committed against one in Amtro's position as the other party to the contract. Owners do not and could not assert such a claim, for reasons already mentioned: there is no evidence that Schnitzer's non-payment of demurrage was the cause of Amtro's financial inability to pay NICTRIC time-charter hire to Owners, rather than any of many other factors contributing to Amtro's financial condition or its decision not to pay the time-charter hire. Schnitzer, moreover, had the right and privilege of litigating the question of its liability for the demur-

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[2] *Sidney Blumenthal & Co.* v. *U. S.*, 30 F.2d 247 (C.C.A. 2, 1929), cert. den. 279 U.S. 847.

[3] *The Poznan*, 276 F. 418 (S.D.N.Y. 1921).

rage in the suit commenced by Owners against Amtro and against Schnitzer as garnishee.

II

The Difference between the Agreed Demurrage Rate and Amtro's Expenses during all or part of the Demurrage Period is not Recoverable under Clause 1 of the Voyage Charter Party.

Amtro claims that it should have been awarded $33,975 over and above the demurrage as "extra expenses incurred by reason of nature of cargo" within the meaning of Clause 1 of the voyage charter party (Ex. 2). It claims that any cargo other than scrap would have been discharged at least 75½ days before the discharge of the NICTRIC cargo was completed, and that it incurred each day during this period expenses for operation of the vessel of $450 over and above the agreed demurrage rate of $700 per day (Amtro's Brief, p. 46).

The relevant part of Clause 1 in context provides:

> "That the said vessel shall proceed to Vancouver, B. C. and/or Portland, Oregon, Charterers option in or out of geographical rotation or so near thereto as she may safely get and lie always afloat, and there load a full and complete cargo under deck of SCRAP AND/OR MOTOR BLOCKS AND/OR SCRAP RAILS AND/OR NON-FERROUS SCRAP AND/OR MAXIMUM 1500 TONS TURNINGS. TURNINGS TO BE LOADED IN ACCORDANCE WITH U. S. COAST GUARD AND NATIONAL CARGO BUREAU REGULATIONS AND UNDER THE SUPERVI-

SION OF A METALLURGICAL EXPERT. ANY EXTRA EXPENSES INCURRED BY REASON OF NATURE OF CARGO AND OF METALLURGICAL EXPERT TO BE FOR CHARTERERS' ACCOUNT."

The "extra expenses" referred to here are clearly any extra expenses of loading, stowing, discharging or caring for cargo of such a nature as to require unusual handling. It clearly had reference to any possible unusual expense in shipping a quantity of turnings in the cargo, and not to scrap in general or to general delay in discharge. Carriage of the turnings was a subject of negotiation between the charter broker and Amtro in fixing the terms of the voyage charter party, and the "extra expense" clause was put in to cover any unusual expenses in handling them (Tr. 150-151, 180-182). Mr. Stewart of Amtro agreed with this, but testified that the language was put in also to cover any delay in getting the entire cargo discharged (Tr. 44). The District Court found against his testimony (R. 145-146) and adopted that of Mr. Bettinger, an employee of the charter broker which negotiated the voyage charter as to both parties (Tr. 150-151).

The District Court's opinion and findings in their entirety on this issue were as follows (R. 145-146):

"EXTRA EXPENSES

"Clause 1 of the voyage charter provides, among other things: 'Any extra expenses incurred by reason of nature of cargo and of metallurgical expert to be for charterer's account . . .' Amtro points to

this language in support of its claim for extra expenses incurred while the NICTRIC was delayed in Japan. While the record discloses that a scrap cargo, such as was carried by the NICTRIC was not favored in the discharging scheme in Japan, it does not support a finding that the total delay, or any specific part thereof, was due to the nature of the cargo. Furthermore, it would require the imagination of a leprechaun to extend this language to cover a situation where a ship carrying scrap was compelled to wait longer to obtain a berth than ships carrying other kinds of cargo. Obviously, the 'extra expenses' mentioned in this clause refer to those expenses, if any, directly incurred in loading, transporting or discharging the scrap. Likewise, the fundamental purpose of demurrage is to make an adequate allowance or compensation for the delay or detention of the vessel. *THE CONQUEROR,* 166 U.S. 110 (1897); *Continental Grain Co.* v. *Armour Fertilizer Works,* 22 F. Supp. 49, 54 (S.D. N.Y. 1938); *THE APOLLON,* 22 U.S. 361, 376 (1824); *W. R. Grace & Co.* v. *Hansen,* 273 F. 486, 496 (9th Cir. 1921). The claim for alleged extra expenses is denied."

Amtro does not claim that it incurred any extra expense in shipping or handling turnings or other unusual cargo. Instead, it claims that its expenses of operating the vessel are recoverable, to the extent they exceeded demurrage, for that portion of the demurrage period extending beyond the period which it claims that a cargo other than scrap would have been delayed.

In addition to the fact that Clause 1 was intended to deal only with any extra expenses incurred in

handling turnings or other peculiar or hazardous cargo, there are other obvious reasons why Amtro's claim fails.

First, as the Court found, there is no substantial evidence that all or any part of the delay was due to the fact that the cargo was scrap. Ex. F-23, relied on by Amtro (Brief, p. 44), was a report dated September 15, 1961, assembled from data collected earlier and did not purport to deal with conditions in the NICTRIC demurrage period, which began October 9, 1961 (R. 105). It was inadmissible hearsay, in any event (See Schnitzer's opening brief on its appeal, pp. 66-67). Neither the report nor any other evidence cited by Amtro would enable a court to find how much less, if any, delay would have been experienced after October 9, 1961, if the NICTRIC, a tramp vessel, had carried logs, lumber, grain or any other cargo. The Court found that Harumi Wharf could not be used because discharge could not occur in seven days, not because the cargo was scrap (R. 143, cf. Amtro's Brief, p. 45). Harumi was a special discharge berth for scrap cargo (Ex. 44H, p. 187-2).

Secondly, the demurrage clauses of the voyage charter were designed and intended by the parties to compensate Amtro for delay beyond the agreed laydays. The parties after negotiations agreed upon a rate of $700 per day for demurrage (Ex. 2, Clauses 7, 18). Schnitzer wanted a rate of only $600 per day, while Amtro originally demanded $1100 per day (Tr. 83). It is common for the agreed demurrage rate to be less than the actual expenses of operating the vessel (Ex.

79, p. 9). If Amtro wished to charter the vessel only if a demurrage rate equal to its operating costs was agreed on, it was free to do so and to refuse to enter the charter on any other terms. Moreover, Amtro demanded but did not get a clause in the voyage charter party guaranteeing that the laydays would not be exceeded (Tr. 83). In short, delay, as Amtro knew, is always possible in ocean carriage, and demurrage was intended to be the agreed compensation for delay in excess of the agreed period for loading and discharging.

The cases cited in the District Court's opinion, supra, p. 18 (R. 146), are among numerous examples of judicial recognition that demurrage clauses are intended by the parties to be the agreed compensation for expenses and loss of profits incurred by the vessel operator in delay beyond the agreed time for loading and discharging. See also *Earn Line S. S. Co.* v. *Manati Sugar Co.,* 269 F. 774, 776 (C.C.A. 2 1920); *Steger* v. *Orth,* 258 F. 619, 623-624 (C.C.A. 2 1919); 4 Williston, CONTRACTS, Sec. 1099B, p. 3102.

CONCLUSION

The District Court was plainly correct in denying Amtro's claims against Schnitzer for additional damages and "extra expenses." There is plainly no basis in the circumstances shown by the record or in the law for regarding the damages awarded to Owners against Amtro for breach of time charter as consequential damages to Amtro from Schnitzer's failure to pay demurrage money, when Schnitzer's liability is at least question-

able. Even less tenable is Amtro's claim that Schnitzer's conduct constituted intentional and unjustifiable interference with Amtro's contractual relations in the time charter with Owners. The "extra expense" clause has no relation to delay in discharge of the cargo, the demurrage clauses providing the agreed compensation for delay in discharge.

Those portions of the District Court's decree challenged by Amtro's cross-appeal should therefore be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

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